

40 North Central Avenue
Phoenix, Arizona 85004-4429
Facsimile (602) 262-5747
Telephone (602) 262-5311

Randolph J. Haines-State Bar No. 005440
Email address: rjh@lrlaw.com

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
1900 Pennzoil Place – South Tower
711 Louisiana
Houston, Texas 77002
Telephone (713) 220-5800
Facsimile (713) 236-0822

H. Rey Stroube, III-Texas State Bar No. 19422000
S. Margie Venus- Texas State Bar No. 20545900
Email address: efiler@akingump.com

Attorneys for Debtor BCE West, L.P., *et al.*

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In Re:) Chapter 11
)
BCE WEST, L.P., *et al.*,) Case Nos. 98-12547
) through 98-12570 ECF CGC
Debtors.) Jointly Administered
)

EID # 38-3196719

DEBTOR'S RESPONSE TO:
1. EXPARTE MOTION FOR
CONTINUANCE OF HEARING ON
DEBTORS' MOTION FOR ORDER
AUTHORIZING ASSUMPTION OF
LEASE OF NONRESIDENTIAL REAL
PROPERTY (DE 941)
2. HOME DEPOT'S OPPOSITION TO
DEBTORS' MOTION FOR ORDER
AUTHORIZING ASSUMPTION OF
LEASE OF NONRESIDENTIAL REAL
PROPERTY (DE 936)
3. HOME DEPOT'S SUPPLEMENTAL
OPPOSITION TO DEBTORS'
MOTION FOR ORDER
AUTHORIZING ASSUMPTION OF
LEASE OF NONRESIDENTIAL REAL
PROPERTY (DE [not docketed])

1 BC GoldenGate, L.L.C., debtor and debtor in possession (the “Debtor”) file this Response
2 with respect to the following pleadings filed by Home Depot, U.S.A., Inc. (“Home Depot”): (i) Ex
3 Parte Motion for Continuance of Hearing on Debtors’ Motion for Order Authorizing Assumption
4 of Lease of Nonresidential Real Property (the “Ex Parte Motion”; DE # 941), (ii) Home Depot’s
5 Opposition to Debtors’ Motion for Order Authorizing Assumption of Lease of Nonresidential
6 Real Property (the “Assumption Opposition”; DE # 936) and (iii) Home Depot’s Supplemental
7 Opposition to Debtors’ Motion for Order Authorizing Assumption of Lease of Nonresidential
8 Real Property (the “Supplemental Assumption Opposition”; DE # [not docketed]). In support of
9 this Response, the Debtor states as follows:
10

11 1. Home Depot continues to file papers which at best can be categorized as
12 disingenuous. Perhaps more accurately described the present activities of Home Depot are a farce
13 in the truest sense of the word in that the positions being espoused are a charade and are making a
14 mockery of the bankruptcy process in which the Debtor is involved. The process employed by
15 Home Depot is abusive of the Debtor’s reorganization efforts and this Court’s jurisdiction.
16

17 2. The tactics of Home Depot are nothing more than those of a bully trying to gratify
18 its economic self-interest and force its will on someone who will not accede to its demands. The
19 essence of the situation is that Home Depot wants the Court to force the Debtor to sell an asset
20 that the Debtor does not want to sell and does not need to sell. The only party for which there is
21 an economic benefit from such a sale would be, not surprisingly, Home Depot. The Debtor has
22 asserted, and intends to provide adequate evidentiary support, that in its business judgment it is in
23 the Debtor’s and the Debtor’s creditors best interest to assume the nonresidential real property
24 leasehold interest with respect to store #1127 located in San Jose, California (the “Lease”).
25
26

1 3. A correct and complete summary of the factual background of this contested matter
2 is as follows:

- 3
- 4 a. On April 5, 1999, the Debtor (together with all other debtors
5 in the above referenced Chapter 11 cases) filed a Second
6 Motion for Extension of Time to Assume or Reject
Nonresidential Real Property Leases (the “2d Extension
Motion”)(DE # 741).
- 7 b. On April 22, 1999, Home Depot, together with the Debtor’s
8 then existing landlord Property Development Associates
9 (“PDA”), filed the Extension Opposition.
- 10 c. On April 27, 1999, the Court conducted a hearing on the
11 Second Extension Motion and granted the relief requested
12 except with respect to the Lease. The hearing on the 2d
Extension Motion and the Extension Opposition, with respect
to the Lease, was continued to May 25, 1999.
- 13 d. On May 24, 1999, and prior to the rescheduled hearing date,
14 the Debtor filed its Motion for Order Authorizing
15 Assumption of Lease of Nonresidential Real Property (Store
16 No. 112&)(DE # 867)(“Motion to Assume”). A hearing on
the Motion to Assume was set and noticed to Home Depot
for June 29, 1999.
- 17 e. On May 25, 1999, at the Debtor’s regularly scheduled
18 hearing date and the date to which the hearing on the Lease
19 had been continued, the Court determined that, with respect
to the Lease, the 2d Extension Motion and the Extension
Opposition were moot as a consequence of the filing of the
Motion to Assume.
- 20 f. On May 28, 1999, Home Depot served Debtor’s counsel with
21 a Bankruptcy Rule 7034 document request and a set of
22 interrogatories pursuant to Bankruptcy Rule 7033 (the
23 “Discovery”).
- 24 g. On June 17, 1999, the Ex Parte Motion by Home Depot and
25 the landlord PDA was filed although the pleading is dated
26 June 8, 1999.

- h. On June 17, 1999, the Court entered an ex parte order continuing the hearing on the Motion to Assume to July 20, 1999.
- i. On June 17, 1999, Home Depot, for the first time acting without PDA, filed the Assumption Opposition.
- j. On July 1, 1999, Debtor's counsel served counsel for Home Depot with objections and responses to the Discovery.
- k. On July 2, 1999, at approximately 5:41 p.m. Central Daylight Time, Debtor's counsel received by fax a letter from Home Depot's counsel purporting to be a "meet and confer" letter.
- l. On July 6, 1999, Home Depot served the Supplemental Assumption Objection (not yet on the docket).

4. In the Extension Opposition PDA, a creditor and a party in interest, and Home Depot, not a creditor or party in interest, allege that the Court should not grant an extension of time for the Debtor to assume or reject the Lease stating in support that "they would be damaged significantly if the Debtor does not assume or reject the Lease before the June 4, 1999 deadline." (p.2, ll.12-14). This conclusion is purportedly justified by the statement that "the Objecting Parties are in the process of negotiating the sale of the shopping center where the Lease is located. It is essential that the Objecting Parties learn whether Debtor will assume or reject the Lease in order to go forward with the closing." (p.2, ll. 14-16)

5. Given the pleadings subsequently filed by Home Depot, one has to wonder whether the statements quoted were sincere and candid. On May 24, 1999, well before June 4, 1999, the Debtor requested authority to assume the Lease. This act should have been all that was necessary to relieve the angst expressed in the Extension Opposition. Home Depot and PDA could go forward with the referenced closing comfortable in the knowledge that the Lease would be assumed thereby avoiding the significant damage alleged to exist if there was a delay beyond June

1 4. The Extension Opposition is replete with rhetoric continually repeating how the lack of
2 knowledge as to the Debtor's intent with respect to the Lease is impeding and creating uncertainty
3 in connection with the purchase and sale transaction between PDA and Home Depot.
4

5 6. Further in support of the original position, an entire section of the Extension
6 Objection is devoted to convincing the Court that pertinent portions of Section 365 of the
7 Bankruptcy Code are designed to guard against "Delay and Uncertainty." (p.5, l.19 through p.6, l.
8 22)
9

10 7. Rather than taking the chance of running afoul of these legal arguments, the Debtor
11 chose to take "delay and uncertainty" out of the equation. That the requirement for timely
12 assumption was a sham and a deceptive pretense is patently obvious from the submission of the
13 Discovery and the filing of the Assumption Opposition.
14

15 8. It is apparent from the facts related to this controversy that Home Depot had no
16 trouble in determining that it should close its purchase of the Hillsdale Shopping Center from
17 PDA. In the Assumption Opposition Home Depot advises for the first time that it is now the
18 Debtor's landlord. (p.2. ll. 2-5)
19

20 9. Wearing its new hat, Home Depot now says that it opposes the lease assumption
21 proposed by the Debtor. Apparently, the only ground asserted in support of the opposition is that
22 the assumption is not a proper exercise of the Debtor's business judgment. And why is this so? It
23 is because Home Depot wants the Debtor out of the leasehold so that Home Depot does not have
24 to build a parking garage! It wants the Court to force the Debtor to sell the leasehold. On
25 information and belief, Home Depot has approached representatives of Debtor's secured lenders
26

1 in an effort to solicit their assistance in imposing Home Depot's will on the Debtor. This blatant
2 interference with the Debtor's relationship with its secured creditors may be addressed
3 subsequently. For now the facts suffice to demonstrate Home Depot's willful and malicious
4 behavior.

5
6 10. Of course, Home Depot does not possess the requisite capacity for veracity to
7 admit the truth of the matter. No, Home Depot asserts that it is in the best interest of the Debtor
8 and the Debtor's creditors to not assume the lease and that the Debtor should be forced to take an
9 offer that has been both rejected and withdrawn. No one can be expected to believe this theatrical
10 and affected pretense.

11
12 11. Home Depot complains incessantly about the lack of response to its "informal
13 discovery" and a one-day delay in service of the Debtor's objections and response to the
14 Discovery.¹ The fact of the matter is that at the time the Discovery was served, there was neither
15 an adversary proceeding nor a contested matter pending which would authorize the submission of
16 either the interrogatories or the document production request. Prior to May 28 the Court had
17 determined that the issues raised in the 2d Assumption Motion and the Assumption Opposition, as
18 they related to the Lease, were moot. Counsel for Home Depot attended by telephone the hearing
19 at which the Court's determination was announced. Based on the Discovery submission three days
20
21

22
23

¹ This allegedly impermissible delay was occasioned by a misstroke of a computer key. Because it is necessary for a
24 verification to be included with interrogatory responses, Debtor's counsel forwarded the completed objections and
25 responses to the corporate offices in Denver for signature and mailing on June 30. Unfortunately, before minor
26 corrections could be made and originals printed for signature, the E-mail drafts were deleted. Because Debtor's
counsel was before the Court on June 30, the documents were resent, mailed, faxed and E-mailed to Home Depot's
counsel the next day before noon.

subsequent, counsel for Home Depot either was unaware of the limitations under the Bankruptcy Rules or chose to ignore the Court's ruling.

12. Bankruptcy Rules 7033 and 7034 are applicable in adversary proceedings. If there is a contested matter, Bankruptcy Rule 9014 makes Rules 7003 and 7044 available. There was no contested matter pending as between the Debtor and Home Depot on May 28. Home Depot created a contested matter when it filed the Assumption Opposition on June 17. Consequently, Debtor was under no obligation to respond to the Discovery, but it did so gratuitously.

13. Given the fundamental defect in the submission of the Discovery, Home Depot should not now be heard to complain because it is not happy with the objections and responses, all of which are entirely in conformity with applicable procedural rules. The status of objections and responses to the Discovery certainly does not form an adequate basis to deny the relief requested in the Motion to Assume. Again, Home Depot's less than hidden agenda is palpably apparent.

14. The Debtor requests that this controversy not be continued further. The Debtor has offered to make relevant discovery available although the Discovery was procedurally improper. The Debtor is ready, willing and able to demonstrate to the Court the soundness of its determination that the Lease should be assumed.

Respectfully submitted this 9th day of July 1999.

DEBTORS AND DEBTORS IN POSSESSION

By: /s/ H. Rey Stroube, III
One of their Attorneys
AKIN, GUMP, STRAUSS, HAUER &
FELD, L.L.P.

H. Rey Stroube, III
S. Margie Venus
1900 Pennzoil Place – South Tower
711 Louisiana
Houston, Texas 77002
(713) 220-5800
(713) 236-0822 (fax)

- and -

LEWIS AND ROCA LLP
Randolph J. Haines
40 North Central Avenue
Phoenix, Arizona 85004-4429
(602) 262-5764
(602) 262-5747 (fax)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 9, 1999 the foregoing Response was served by e-mail, fax and by first class United States mail, postage prepaid, to counsel for Home Depot, Brian L. Davidoff, Rutter, Hobbs & Davidoff Incorporated.

/s/ Karen Anders